A **COSCO CONTAINER LINES CO LTD & ANOR**

v.

TRENGGANU FOREST PRODUCTS SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
WAN ADNAN MUHAMAD JCA
AZHAR MA'AH JCA

C [CIVIL APPEAL NOS: W-02-82-2009 & W-02-188-2009]
4 OCTOBER 2010

CONTRACT: *Frustration - Fraudulent misrepresentation - Bill of lading - Whether contained misrepresentations - Whether trial judge failed to*
D *appreciate importance and significance of contemporaneous documents - Whether trial judge had carefully and judicially evaluated and appreciated the facts - Whether trial judge had fallen into error*

CIVIL PROCEDURE: *Action - Limitation - Issue of estoppel - Whether arose*
E

The plaintiff/respondent through a contract ('contract of sale') agreed to sell containers of plywood ('the cargo') to Hebei Metal & Minerals Import and Export Corporation ('the buyer'). For the purpose of the shipment of the cargo, the plaintiff/respondent
F agreed to enter into a contract of carriage for the cargo with the defendants/appellants which was evidenced by a bill of lading No. PKXG-4018. The first defendant/appellant issued the bill of lading as 'shipped on board' on 30 April 1994 about the vessel ('Tuo He') at Port Klang and for discharge at Xingang Port,
G China purporting to enter into the contract of carriage with the plaintiff/respondent. The plaintiff/respondent submitted, *inter alia*, the bill of lading to the negotiating bank for due payment pursuant to a letter of credit. However, the buyer obtained an injunction to stop one Bank of China, Changsha from releasing funds
H pursuant to the letter of credit on the ground that the bill of lading was fraudulent. It was subsequently discovered that the cargo was not 'shipped on board' on 30 April 1994 as represented by the bill of lading and the cargo was in fact discharged at Hong Kong before being transhipped on another vessel to Xingang Port,
I China. In the arbitration between the buyer and the plaintiff before the China International Economic Trade Arbitration

Commission, Beijing ('CIETAC') in relation to the dispute concerning the contract of sale, CIETAC granted an award in favour of the buyer. Pursuant to the said award, the plaintiff/respondent made payment to the buyer and incurred losses and expenses. The plaintiff/respondent sought compensation from the defendants/appellants for the total sum of US$1,446,469.58 being the loss of the cargo (US$1,170,239.58) and the payments made in connection to the award (US$276,230) in relying on the said representations made by the defendants/appellants. At the end of the trial, the learned trial judge entered judgment for the plaintiff/respondent against the defendants/appellants. Hence, the defendants/appellants appealed. The issues that arose were (i) whether the limitation period of one year (under the Carriage of Goods By Sea Act 1950, which incorporates the Hague Rules) applied and (ii) whether the trial judge in coming to his decision 'had carefully and judicially evaluated and appreciated the facts, the evidence and the documents' before him.

Held (allowing the appellants' appeal with costs; setting aside High Court order)
Per Azhar Ma'ah JCA delivering the judgment of the court:

(1) The issue of estoppel based on limitation had been raised and argued before three forums, *ie*, the Senior Assistant Registrar, the judge in chambers and finally the Court of Appeal. The finality was that, since there was no further appeal the issue of limitation had been determined in the plaintiff/respondent's favour. On that basis, the appellants failed on the first ground. (para 9)

(2) The learned trial judge did not address his mind to the significance and prominence of two documentary evidence which had provided cogent evidence that it was the plaintiff/respondent who had masterminded the manipulation of the all important document *ie*, the bill of lading P37. Evidence showed that amendments to certain true and original particulars found in exh. P37 were made at the request and at the behest of the plaintiff/respondent. The submission of the plaintiff/respondent that the manipulation of the bill of lading was the result of the defendants/appellants' misrepresentation was unsupported by evidence. The trial judge in deciding as he did had fallen into error. (paras 18 & 19)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden melalui kontrak ('kontrak jualan') bersetuju untuk menjual kontena-kontena papan lapis ('kargo') kepada Hebei Metal & Minerals Import and Export Corporation ('pembeli'). Untuk tujuan penghantaran kargo, plaintif/responden bersetuju untuk memasuki kontrak pengangkutan bagi kargo dengan defendan-defendan/perayu-perayu yang dibuktikan oleh satu bil muatan No. PKXG-4018. Defendan pertama/perayu telah mengeluarkan bil muatan sebagai 'dikirim' pada 30 April 1994 mengenai kapal ('Tuo He') di Port Klang dan untuk pelepasan di Xingang Port, China bertujuan untuk memasuki kontrak pengangkutan dengan plaintif/responden. Plaintif/responden menyerah, antara lain, bil muatan kepada bank perunding urus untuk pembayaran dijangka mengikut satu surat kredit. Walaubagaimanapun, pembeli memperolehi satu injunksi menghalang Bank of China, Changsha dari melepaskan dana mengikut surat kredit atas alasan bahawa bil muatan adalah satu penipuan. Ia kemudiannya ditemui bahawa kargo tidak 'dikirim' pada 30 April 1994 seperti dinyatakan oleh bil muatan dan kargo sebenarnya telah dilepaskan di Hong Kong sebelum ia dipindahkan pada satu lagi kapal yang lain yang menuju ke Xingang Port, China. Di dalam timbangtara antara pembeli dan plaintif/responden di hadapan China International Economic Trade Arbitration Commission, Beijing ('CIETAC') berhubungan dengan pertikaian mengenai kontrak jualan, CIETAC telah membenarkan award yang memihak kepada pembeli. Mengikut award tersebut, plaintif/responden membuat bayaran kepada pembeli dan menanggung kerugian dan perbelanjaan. Plaintif/responden cuba mendapatkan pampasan daripada defendan-defendan/perayu-perayu untuk jumlah keseluruhan US$1,446,469.58 iaitu kehilangan kargo (US$1,170,239.58) dan bayaran-bayaran yang telah dibuat berhubungan dengan award (US$276,230) dalam bergantung pada representasi-representasi yang dibuat oleh defendan-defendan/perayu-perayu. Pada akhir kes bicara, yang arif hakim bicara memasukkan penghakiman untuk pihak plaintif/responden terhadap defendan-defendan/perayu-perayu. Oleh itu, defendan-defendan/perayu-perayu merayu. Isu-isu yang dibangkitkan adalah (i) sama ada tempoh had masa satu tahun (di bawah Akta Pengangkutan Barang Melalui Laut 1950, yang menggabungkan Hague Rules) digunapakai dan (ii) sama ada hakim bicara apabila membuat keputusannya 'telah dengan teliti dan secara kehakiman menilai dan menghargai fakta-fakta, keterangan dan dokumen-dokumen' yang dikemukakan di hadapannya.

Diputuskan (membenarkan rayuan perayu-perayu dengan kos; mengenepikan perintah Mahkamah Tinggi)
Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

(1) Isu estoppel berdasarkan had masa telah dibangkitkan dan dihujahkan di hadapan tiga forum, iaitu Penolong Kanan Pendaftar, Hakim Dalam Kamar dan akhirnya di Mahkamah Rayuan. Kemuktamadan adalah, oleh kerana tiada rayuan seterusnya isu had masa telah diputuskan pada pihak plaintif/responden. Atas dasar itu, perayu-perayu telah gagal atas isu pertama.

(2) Yang arif hakim bicara tidak menimbangkan kepentingan dan kemasyhuran dua keterangan dokumentari yang telah menyediakan bukti kukuh bahawa ia adalah plaintif/responden yang telah mendalangi manipulasi dokumen yang penting iaitu bil muatan P37. Keterangan menunjukkan pindaan-pindaan yang dibuat pada butir-butir asal dan benar tertentu yang dijumpai di eks. P37 dibuat atas permintaan dan perintah plaintif/responden. Hujahan plaintif/responden bahawa manipulasi bil muatan adalah akibat misrepresentasi defendan-defendan/perayu-perayu tidak disokong oleh mana-mana keterangan. Hakim bicara dalam membuat keputusannya telah membuat kesalahan.

Case(s) referred to:
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

Legislation referred to:
Carriage Of Goods By Sea Act 1950, First Schedule art III r. 6

For the 1st appellant - Dato' Cecil Abraham (Jeremy M Joseph, Rishwant Singh & Gary E Chong with him); M/s Joseph & Partners
For the 2nd appellant - Ravin Woodhull (Mohan Das with him); M/s Zaid Ibrahim & Co
For the respondent - M Nagarajah (R Tharmy & Tanya Lopez with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Suit No: D-5-22-412-1997]

[Editor's note: For the High Court judgment, please see Trengganu Forest Products Sdn Bhd v. Cosco Container Lines Company Ltd & Anor [2009] 7 CLJ 573.]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Azhar Ma'ah JCA:

[1] This is an appeal by the defendants (1) Cosco Container Lines Co Ltd (2) Chung Chiao Shipping Sdn Bhd against the judgment of Kuala Lumpur High Court dated 8 January 2009 in favour of the plaintiff Trengganu Forest Products Sdn Bhd. The factual background of the plaintiff's claim as stated in the trial judge's grounds of judgment are as follows.

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> 2. The Plaintiff through a contract dated 4.3.1994 (No. 94HBM-002) ("Contract of Sale"), agreed to sell 56 containers of plywood ("the Cargo") to Hebei Metal & Minerals Import and Export Corporation ("the Buyer"). The express terms of the Contract of Sale stipulate that:
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> (a) the shipment of the Cargo must not be later than 30.4.1994;
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> (b) the Cargo be loaded at the Malaysian Port;
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> (c) the Cargo be discharged at Xingang Port, China; and
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> (d) payment to be made by way of irrevocable letter of credit.
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> 3. For the purpose of the shipment of the Cargo, the Plaintiff agreed to enter into a contract of carriage for the Cargo with the Defendants. The said contract of carriage is to be evidenced by a bill of lading No. PKXG-4018 on the following terms:
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> (a) the Defendants are to issue a shipped on board of bill of lading dated 30.4.1994; and
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> (b) the Cargo should be transported from Port Klang direct to Xingang Port, China;
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> (c) the bill of lading was issued by the Defendants indicating compliance with the said terms.
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> 4. The 2nd Defendant was at all material times the agent of the 1st Defendant.
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> 5. The 1st Defendant issued the bill of lading as "shipped on board" on 30.4.1994 about the vessel Tuo He V.103 ("TUO HE") at Port Klang and for discharge at Xingang Port, China, purporting to enter into the contract of carriage with the Plaintiff. The Defendants in the bill of lading made the following representations/statements:
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> I

(a) the Cargo was shipped on board on 30.4.1994; and

(b) Tuo He's port of discharge is Xingang Port, China.

6. Relying on the said representations, the Plaintiff submitted, *inter alia*, the bill of lading to the negotiating Bank for due payment pursuant to a letter of credit. However, the Buyer obtained an injunction to stop one Bank of China, Changsha from releasing funds pursuant to the letter of credit on the ground that the bill of lading was fraudulent.

7. It was subsequently discovered that the Cargo was not "shipped on board" on 30.4.1994 as representated by the bill of lading and the Cargo was in fact discharged at Hong Kong before being transhipped on another vessel to Xingang Port, China.

8. In the arbitration between the Buyer and the Plaintiff before the China International Economic and Trade Arbitration Commission, Beijing ("CIETAC") in relation to the dispute concerning the Contract of Sale, CIETAC granted an Award dated 2.9.1996 in favour of the Buyer. Pursuant to the said Award, the Plaintiff made payment to the Buyer and incurred loss and expense totalling US$276,230.00.

9. The Plaintiff in this suit is seeking compensation from the Defendants for the total sum of US$1,446,469.58 together with interest and costs, being the loss of the Cargo (US$1,170,239.58) and the payments made in connection to the Award (US$276,230.00) in relying on the said representations made by the Defendants.

[2] At the end of the trial, the learned trial judge made his decision as follows:

Based on the above considerations, the Court concludes that:

(a) The Plaintiff has established beyond reasonable doubt that the Defendants are liable to the Plaintiff for the tort of deceit in making fraudulent misrepresentation in the bill of lading.

(b) The Defendants have failed to discharge the onus of proving fraud on the part of the Plaintiff in instructing the Defendants to make the said representation in the bill of lading and thus the defendant's defence of *exturpi causa non oritur* action must fail;

A (c) The Plaintiff has proven beyond reasonable doubt that the Defendants have caused loss and damage to the Plaintiff in the sum totalling US$1,446,469.58 as a result of the fraudulent misrepresentation made by the Defendants in the bill of lading.

B Therefore, judgment be entered for the Plaintiff against the Defendants as prayed in the Re Amended Writ and Statement of Claim dated 17.5.2008 filed herein.

[3] Substantially, two issues were raised in the argument before us. Firstly, is the question as to whether the limitation period of C one year (under the Carriage of Goods By Sea Act, 1950, (which incorporates the Hague Rules)) apply. Secondly, is the issue whether the learned trial judge in coming to his decision "has carefully and judicially evaluated and appreciated the facts, the D evidence and the documents" before him.

[4] On the first issue our attention is drawn to art. 111 r. 6 of the Rules in the First Schedule of COGSA (the Hague Rules) which reads as follows:

E 6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, F if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of G joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered, In the case H of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

[5] This action apparently was filed in the High Court on I 28 July 1997, more than one year after the goods were delivered to the consignee. On this premise it is submitted for the appellants that the respondent is estopped from instituting this action against the appellants as limitation had already set in.

[6] In reply to the above, counsel for the respondent argued that the matter has been exhaustively canvassed and argued before the Senior Assistant Registrar, on appeal before the judge-in-chambers and finally before the Court of Appeal. What transpired in the court below was that the issue of limitation was ventilated before the Senior Assistant Registrar in the appellants' application to strike out the respondent's claim. It was dismissed. The decision was taken on appeal before the judge-in-chambers and was allowed and the respondent's suit was struck out. The respondent appealed to the Court of Appeal and it was ordered that the respondent's suit be reinstated and the matter be sent back for trial in the High Court. There was no appeal against this order at the Court of Appeal.

[7] Based on the above scenario it is submitted for the respondent that the issue of limitation should no longer be an issue in the present appeal as it has been fully adjudicated on the merits. In support of this contention our attention is drawn to a number of authorities. In *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, the Court of Appeal had these to say:

> Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal.

[8] On the same subject matter the decision in *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553 was also referred to for our perusal. The Court of Appeal in that case decided that:

> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit. Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication.

[9] On the facts of the case which is now on appeal before us, we have come to an inescapable conclusion that the issue of estoppel based on limitation has been raised and argued before three forums, ie, the Senior Assistant Registrar, the judge-in-chambers and finally the Court of Appeal. The finality is that, since

there was no further appeal the issue of limitation had been determined in the respondent's favour. On that basis, the appellants fail on the first ground.

[10] Having arrived at the above conclusion there remains for consideration the second issue. It is the threshold of the appellants' defence to the respondent's claim that the appellants, at all times, made known to the respondent that the vessel MV Tuo He was estimated to arrive in Port Klang on 7 May 1994. There was no motive, necessity or occasion for the appellants to misrepresent this fact to the respondent to induce the respondent to enter into the contract of carriage with the appellants. It is submitted that the learned trial judge in coming to his decision had failed to appreciate the chronology of events and the documents underlying the respondent's cause of action against the appellants. It is further added that the trial judge had completely disregarded the contemporaneous documents that were tendered before the court during the trial of this action.

[11] In fortification of the above submission the following evidence was ventilated before us, ie:

> The very first letter written by the 1st appellant dated 14.4.1994 stated clearly and unequivocally that the MV Tuo He was estimated to arrive in Port Klang on 7.5.1994. At the same time the respondent was also informed by the 2nd appellant that there was another vessel that was due to arrive in Port Klang on 27.4.1994. The respondent, however, chose the vessel arriving on 7.5.1994 because it could not get the goods to Port Klang on time to ship them on MV Wei He (which was estimated to arrive on 27.4.1994).

[12] With regard to the above contention we had the opportunity of perusing the relevant documents in particular exhibits marked as P4.

[13] For ease of reference, we reproduce P4 which reads as follows:

> Chung Chiao Shipping Sdn Bhd
> Lot 3.35, 3rd Floor, Wisma Stephens,
> Jalan Raja Chulan, 50200 Kuala Lumpur Facsimile Telegraph
> Tel: 03-2414616 (3 Lines) Cable: Chungship Telex: MA 30770 CCSX

Sender Fax No: (603) 2416727 Ref No: 1524/TN Date: 14.4.94
Receiver Fax No: 05-571298 Total Pages: 1 (Including This Cover Sheet)

To Terengganu Forest Products
FM Chung Chiao Shipping KL/Tony Ng
Ref 1524/TN 14/4/94
Attn: Mrs Yip

Re: 56x40' STC Plywood
Fm Port Klang To Xingang

Further To Our Teleconversation We Hereby Confirm Your Booking As Follows:

Vessel	:	MV Wei He V.143 ETA PKL 27/4 Or WV Tuo He V.139 ETA PKL 07/5
Commodity	:	Plywood
Volume	:	56x40' DV
Pol/Pod	:	Port Klang / Xingang Via Hkg
Rate	:	USD1350/40' CY/CY
Term	:	Frt Prepaid At Port Klang

Note: We Agreed To Issue 30/4/94 B/L If Shipment Loaded On Mv Tuo He V.139 ETA PKL 7/5.

Pls Cfm Abv All In Order.

Best Regards

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[14] It is noted that the contents of this letter affirmed the contention of the appellants that the respondent was informed of the availability of a ship MV Wei He to transport the commodity in question, that was expected to arrive in Port Klang on 27 April 1994.

[15] We had also perused the other relevant document ie, exh. P37, a combined Transport Bill of Lading. This document was in draft that was sent to the respondent by the 2nd appellant with certain amendments to be made. We note that this document in question in its original form contained the true and actual details and particulars pertaining to the shipment and the consignment.

Apparently the document which was received by the respondent on 7 May 1994 was faxed back to the 2nd appellant by the respondent on the same day with a request that certain amendments were to be made. The detail of the amendments were handwritten, admittedly by the staff of the respondent, Au Yong Mee Yen (PW3). This witness in her evidence before the trial judge in no uncertain terms informed the court that she had handwritten the remarks/amendments that were to be made in the draft Combined Transport Bill of Lading in the following manner:

(i) "On Board Date Must Be 940430 also"

(ii) "Port of Discharge (originally stated as Hong Kong) was to be changed to "Xingang Port".

[16] On the basis of the above scenario and events it is submitted before us that the amendments to certain true and original particulars found in the exh. P37 were made at the request and at the behest of the respondent. In the circumstances, it is submitted further that the learned trial judge in coming to his conclusion has failed to appreciate the importance and significance of the contemporaneous documents such as exhs. P4 and P37.

Our Findings

[17] In the face of the above-mentioned issue and contention of the appellants, we had perused the response and answers put to the fore by the respondent in resisting the appellants' grounds of appeal. Unfortunately, we don't seem to be able to find much substance in the respondent's replies. We note that what were submitted by the respondent were unsupportable by substantive evidence.

[18] In our judgment it is manifest that exhs. P4 and P37 formed an essential link in the appellants' reasoning on the issue. From our observation it is apparent that the learned trial judge did not address his mind to the significance and prominence of the two documentary evidence which in our view had provided cogent evidence that it was the respondent who had masterminded the manipulation of the all important document ie, the bill of lading P37.

[19] It is also our view that the submission of the respondent that the manipulation of the bill of lading was the result of the appellants' misrepresentation, is unsupported by evidence.

[20] For all these reasons we are satisfied and we hold that the learned trial judge in deciding as he did has fallen into error and we therefore, allow the appellants' appeal with costs and set aside the High Court's order.